BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FLORIDALMA RODRIGUEZ	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 250,091; 250,092
	)	& 253,525
IBP, INC.	)	
Respondent,	)	
Self-Insured	)	

ORDER

Claimant appealed the October 23, 2002 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 18, 2003. Jeffrey K. Cooper of Topeka, Kansas, was appointed Board Member pro tem to serve in place of Board Member Gary M. Korte, who recused himself from this proceeding. Stacy Parkinson of Olathe, Kansas, was appointed Board Member pro tem to serve in place of retired Board Member Gary M. Peterson.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the record contains the transcript from the December 7, 2001 motion hearing.

ISSUES

Claimant alleges that while working for respondent she sustained a series of accidents. In Docket No. 250,091, claimant alleged injuries to her right upper extremity and neck. In Docket No. 250,092, claimant alleged injuries to her right upper extremity, neck, back, right lower extremity and the left hand and fingers. Finally, in Docket No. 253,525, claimant alleged injuries to her right upper extremity and shoulder, back, her right side and both legs. The parties agreed to consolidate the claims for litigation and decision

but, more importantly, agreed that March 15, 2000, was the appropriate accident date for all the alleged injuries.

The principal issue presented to Judge Avery was the nature and extent of claimant's injuries and disability. In the October 23, 2002 Award, the Judge determined claimant had a 20 percent wage loss and a 22 percent task loss for a 21 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Claimant contends Judge Avery erred. In her brief to the Board, claimant argues she has a 54.54 percent task loss and a 20 percent wage loss, which creates a 37.25 percent work disability. In the alternative, claimant argues that her task loss is at least 32 percent, which would create a 26 percent work disability. Accordingly, claimant requests the Board to modify the October 23, 2002 Award to increase her work disability rating.

Conversely, respondent contends Judge Avery erred by failing to limit claimant's permanent partial general disability to her functional impairment rating. Respondent argues that claimant should have quit her job in Omaha, Nebraska, and should have moved back to Emporia, Kansas, in August 2001 when respondent offered to accept her back to work. Respondent argues that claimant failed to make a good faith effort to return to comparable wage employment and, therefore, a post-injury wage should be imputed in determining claimant's permanent partial general disability. Moreover, respondent argues that claimant does not have a permanent injury to her neck and that her functional impairment rating is 10 percent to the whole person for the injuries to the low back and right upper extremity. In the alternative, respondent argues that any work disability should be limited to 19 percent, which represents a 16 percent wage loss and a 22 percent task loss. Accordingly, respondent requests the Board to reduce the permanent partial general disability rating or, in the alternative, to affirm the Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

Claimant is from Guatemala and has a third grade education. Claimant speaks, reads and writes Spanish but she also understands some English. Claimant worked for respondent's meat packing plant in Emporia, Kansas, for approximately three years. In

these claims, she alleges she sustained a series of accidents working for respondent injuring her right upper extremity, left shoulder, neck and low back.[1]

The parties agreed that the three applications for workers compensation benefits that claimant filed would be consolidated into one claim. Moreover, the parties agreed that March 15, 2000, was the appropriate date of accident for all three of these claims. Finally, the parties also agreed that claimant's injuries arose out of and in the course of employment with respondent. Respondent, however, disputes that claimant injured her neck while working for the company.

As a result of claimant's work-related injuries, claimant received medical treatment for her right upper extremity from Dr. J. Mark Melhorn of Wichita, Kansas. After a period of conservative treatment, in June 1999 the doctor performed surgery on claimant, including a right carpal tunnel release, an ulnar nerve decompression at the right elbow and a right first dorsal compartment release.

Because Dr. Melhorn was an upper extremity specialist, respondent referred claimant to Dr. Jeffrey MacMillan of Overland Park, Kansas, for low back treatment. The doctor first saw claimant in July 2000 and initially diagnosed right L5 radiculopathy and right carpal tunnel and cubital tunnel syndrome. An MRI indicated that claimant had degenerative disk disease in her low back. Claimant received three epidural steroid injections in her low back. By the end of January 2001, the doctor determined claimant had reached maximum medical recovery and he, therefore, rated and released claimant.

Claimant continued to work for respondent until May 27, 2001, when respondent released her as the company no longer had a job for her. Before the release, claimant was working light duty handling trash bags full of meat that were being returned. After the release, claimant continued to check with respondent for appropriate work. Claimant bid on numerous jobs but none were awarded. Claimant applied for unemployment benefits but was denied.

Eventually, claimant found a job with another employer in the Emporia, Kansas, area where she worked for approximately five weeks earning $5.75 per hour. But claimant left that job and in early August 2001 moved to Omaha, Nebraska. On August 6, 2001, claimant commenced a new job earning $7.85 per hour, which was increased to $8.10 per hour after three months. When claimant testified in June 2002 at the regular hearing, she continued to work in Nebraska packing disposable plates and lids.

[1] See R.H. Trans. at 8-9.

I What is claimant's functional impairment rating?

The record includes four doctors' opinions regarding claimant's functional impairment. Two of the opinions are from doctors whom respondent selected to treat claimant. The third opinion is from claimant's hired expert. And the fourth is from the doctor selected by the Judge to provide an unbiased opinion.

Dr. Melhorn, the doctor who operated on claimant's right upper extremity, in October 1999 determined that according to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.) claimant sustained a 9.45 percent functional impairment to the right arm as a result of the carpal tunnel, ulnar nerve and de Quervain's conditions.

Although claimant complained about symptoms in her neck and right shoulder, Dr. Melhorn did not find that they needed treatment. Likewise, the doctor did not give an impairment rating to those areas of the body.

Dr. MacMillan, the doctor who treated claimant's low back, in January 2001 rated claimant as having a five percent whole person functional impairment under the AMA *Guides*. The doctor only rated claimant's low back condition as he did not attempt to rate the impairment in her right upper extremity.

According to Dr. MacMillan, claimant did not make neck complaints while he treated her and the EMG studies that he reviewed concerning her right upper extremity did not indicate a cervical radiculopathy. The doctor did not rate claimant's cervical spine.

Claimant's attorney hired Dr. Pedro A. Murati to evaluate claimant for purposes of these claims. The doctor saw claimant in May 2001 and diagnosed lumbosacral strain with severe radiculopathy, myofascial pain syndrome affecting the neck and right shoulder, and right hand pain post carpal tunnel release, de Quervain's and right ulnar nerve elbow decompression, which he rated at 30 percent to the whole person using the AMA *Guides* (4th ed.).

The Judge requested Dr. Peter V. Bieri to evaluate claimant's injuries and functional impairment for purposes of these proceedings. The doctor examined claimant in December 2001 and determined that claimant's injuries were caused by repetitive overuse. Using the AMA *Guides* (4th ed.), Dr. Bieri rated claimant as having a five percent whole person functional impairment for injury to the cervical region, a five percent whole person functional impairment for injury to the low back, and a 15 percent permanent impairment to the right upper extremity, all of which combined for an 18 percent whole person functional impairment.

The Board concludes that claimant sustained an 18 percent whole person functional impairment due to the work-related injuries that she sustained while working for respondent. In this instance, the Board finds Dr. Bieri's opinions the most persuasive as he was selected by the Judge to provide an independent and unbiased opinion, which it appears he did.

II What is claimant's wage loss, if any, for purposes of the permanent partial general disability formula?

The parties agreed that claimant's pre-injury average weekly wage was $403.49, which included $25.10 per week for fringe benefits or additional compensation items. When claimant last testified she was earning $8.10 per hour, or $324 per week, working for another employer.

Shortly after claimant began working in Omaha, Nebraska, she received an August 6, 2001 letter from respondent stating that it had identified a job that she could do without violating the January 2001 medical restrictions that had been issued by Dr. MacMillan. The letter read, in part:

> The purpose of this letter is to inform you the full duty job of Pull Position Miscellaneous has been identified as a position falling within your permanent physical restrictions. Dr. MacMillan has reviewed the job analysis and video of the position, Pull Position Miscellaneous, and feels you can safely perform this position within the permanent physical restrictions he assigned you on 1-26-01.
>
> This is great news for you. The position is located on the Processing side of the plant. The supervisor over the area you will be working in is David Simon. You will report to your new position no later than 8-13-01 at 3:00 p.m.[2]

But claimant did not return to Emporia, Kansas, to work. Accordingly, respondent argues that claimant's failure to return to its employment is tantamount to bad faith and, therefore, the Board should impute a post-injury wage for purposes of determining claimant's permanent partial general disability. The Board disagrees.

The greater weight of the evidence indicates that claimant made a good faith effort to find work after May 27, 2001, when respondent released her. Accordingly, claimant's actual post-injury wages should be considered in determining the wage loss that claimant has sustained as a result of these work-related injuries.

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[2] R.H. Trans., Resp. Ex. A.

Respondent also argues that the Board should compare claimant's hourly wages pre- and post-injury in determining her actual wage loss. The Board disagrees.

Claimant's permanent partial general disability is determined by K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The permanent partial general disability formula provides that wage loss is determined by comparing the pre- and post-injury average weekly wages. Accordingly, comparing claimant's pre-injury wage of $403.49 with her post-injury wage of $324, the Board finds that claimant has sustained a 20 percent actual wage loss for the period after she left respondent's employment.

III What is claimant's task loss for purposes of the permanent partial general disability formula?

Similar to the divergent opinions regarding claimant's functional impairment, the record also includes several opinions regarding the percentage of former work tasks that claimant lost as a result of her work-related injuries.

According to Dr. Melhorn, claimant should be restricted to the medium category of labor and refrain from lifting more than 50 pounds maximum and more than 25 pounds

frequently. In addition, the doctor believed that claimant also should limit repetitive forceful gripping of such items as hooks, knives and scissors.

At his deposition, Dr. Melhorn reviewed the list of 18 former work tasks identified by Patricia Conway, the vocational expert hired by respondent, as those tasks which claimant had performed in the 15-year period before sustaining the injuries that are the subject of this claim. The doctor indicated that claimant definitely should not perform one of the former tasks (or approximately six percent) but that there were three others that he questioned whether claimant could perform as he needed additional information. The doctor also reviewed the list of the 11 former work tasks compiled by Jim Molski, the vocational expert hired by claimant, and noted that claimant could no longer perform three of the 11 tasks (or approximately 27 percent).

Based upon his contact with claimant, Dr. MacMillan recommended that claimant avoid repetitive gripping with her right hand, limit gripping to a medium force, avoid lifting and carrying more than 20 pounds and limit pushing and pulling to no greater than 30 pounds. Although the restriction regarding gripping was intended for claimant's right upper extremity injuries, the remaining restrictions were placed on claimant due to her low back injury.

At Dr. MacMillan's deposition, the doctor reviewed Ms. Conway's task list and found only two of the 18 tasks (or approximately 11 percent) that he questioned whether claimant could perform due to her permanent low back injury. Reviewing Mr. Molski's list of former work tasks, the doctor indicated that claimant would be unable to perform two of the 11 tasks (or approximately 18 percent).

On the other hand, Dr. Murati determined that claimant should never climb ladders; never crawl; never use hooks, knives or vibratory tools with the right hand; avoid heavy grasping with the right hand; avoid working above the right shoulder; avoid working more than 18 inches away from the body; avoid placing the neck in an awkward position; use good body mechanics at all times; alternate sitting, standing and walking; avoid bending, walking, climbing stairs and squatting more than occasionally; avoid repetitive grasping and grabbing with the right hand more than occasionally; avoid lifting more than 20 pounds more than occasionally; avoid walking more than frequently and avoid repetitive right hand controls more than frequently.

Considering those permanent work restrictions in light of Mr. Molski's task list, Dr. Murati concluded claimant lost the ability to perform six of the 11 job tasks (or approximately 55 percent).

The final task loss opinion was from Dr. Bieri. Dr. Bieri maintained that claimant should not perform work beyond the light-medium physical demand level, which restricted claimant's occasional lifting to no more than 30 pounds, frequent lifting to no more than 15 pounds and constant lifting to no more than five pounds. The doctor also concluded that claimant should limit using her right upper extremity by limiting occasional lifting to no greater than 10 pounds, frequent lifting to no more than five pounds and constant lifting to only negligible amounts. Finally, Dr. Bieri believed that handling and fingering should not be performed constantly and be limited to the weights described.

According to Dr. Bieri, claimant lost the ability to perform four of 18 (or approximately 22 percent) of the former tasks compiled by Ms. Conway and four of 11 (or approximately 36 percent) of the former work tasks compiled by Mr. Molski.

Again, the Board is persuaded by Dr. Bieri's testimony and opinions. The Board adopts Dr. Bieri's opinion and conclusion that claimant lost the ability to perform four of the 11 work tasks that Mr. Molski indicated that claimant performed in the 15 years before she sustained these accidental injuries. Consequently, the Board concludes claimant sustained a 36 percent task loss. In reaching that conclusion the Board has disregarded the task list formulated by Ms. Conway as Ms. Conway's list breaks down claimant's tasks into specific physical movements or attributes and treats each movement or attribute as an individual task. Comparing the two task lists that were utilized in these proceedings, the Board concludes Mr. Molski's list better defines and describes claimant's former work tasks.

IV What is claimant's permanent partial general disability?

As indicated above, K.S.A. 1999 Supp. 44-510e sets forth the formula for determining claimant's permanent partial general disability. But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Kansas Court of Appeals in *Watson*[6] recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

Nevertheless, as indicated above, claimant established that she made a good faith effort in seeking and obtaining appropriate employment after sustaining her work-related injuries. Accordingly, for purposes of the permanent partial general disability formula claimant did not sustain any wage loss from the stipulated March 15, 2000 accident until May 27, 2001, when she was released by respondent. But for purposes of claimant's permanent partial general disability after May 27, 2001, claimant has a 20 percent wage loss.

Averaging claimant's 20 percent wage loss with her 36 percent task loss creates a 28 percent permanent partial general disability commencing May 28, 2001. The parties may request review and modification should claimant's post-injury wage significantly change.

Consequently, the October 23, 2002 Award should be modified.

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[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

AWARD

WHEREFORE, the Board modifies the October 23, 2002 Award and grants claimant an 18 percent permanent partial general disability through May 27, 2001, followed by a 28 percent work disability.[8]

Floridalma Rodriguez is granted compensation from IBP, Inc., for a March 15, 2000 accident and resulting disability. Based upon an average weekly wage of $403.49, Ms. Rodriguez is entitled to receive the following disability benefits:

For the period ending May 27, 2001, 62.57 weeks of benefits are due at $269.01 per week, or $16,831.96, for an 18 percent permanent partial general disability.

For the period commencing May 28, 2001, 53.63 weeks of benefits are due at $269.01 per week, or $14,427.01, for a 28 percent permanent partial general disability and a total award of $31,258.97, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[8] Claimant's wage loss varied following the period that she left respondent's employment. The Board has not made separate findings for those periods as the amount of benefits that claimant is entitled to receive for those periods does not vary due to the accelerated payout method under the Workers Compensation Act.

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation